

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

EASTLAND FOOD CORPORATION<sup>1/</sup>

Employer

and

TEAMSTERS LOCAL UNION NO. 355  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, AFL-CIO

Petitioner

**Case 5-RC-14870**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>2/</sup>
3. The Petitioner involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.<sup>3/</sup>

All full-time and regular part-time drivers, driver helpers, warehouse employees, checkers, order processors, inventory control employees, cashiers and warehouse merchandise return employees employed by the Employer at its Columbia, Maryland facility, excluding sales employees, all other employees, guards and supervisors as defined in the Act.

**DIRECTION OF ELECTION**

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for

cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

**TEAMSTERS LOCAL UNION NO. 355, A/W  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**

**LIST OF VOTERS**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **August 26, 1999.**

Dated August 12, 1999

at Baltimore, Maryland

/s/ LOUIS J. D'AMICO  
Regional Director, Region 5



1/ The name of the Employer appears as amended at the hearing.

2/ **Eastland Food Corporation** (the **Employer**) is a Maryland corporation engaged in the wholesale import and distribution of Asian food products, kitchenware and equipment from its Columbia, Maryland facility. During the past twelve (12) months, a representative period, the Employer purchased and received goods and services valued in excess of \$50,000 directly from points located outside the State of Maryland. The parties stipulated and the record shows that the Employer is engaged in commerce within the meaning of the Act.

3/ **Teamsters Local Union No. 355, a/w International Brotherhood of Teamsters, AFL-CIO** (the **Petitioner** or the **Union**) filed the petition in this case seeking to represent a unit of all drivers, warehousemen and dock checkers employed by the Employer at its Columbia, Maryland facility, excluding all managers, clerical employees and supervisors as defined by the Act. The Union stated its position that it seeks to represent employees involved in the functions of checking merchandise loaded onto trucks for delivery and off loaded after delivery from abroad and after pickups of returns and damaged goods, employees involved in warehousing and storing merchandise at the Employer's facility and employees involved in the delivery of such merchandise. At the hearing, the Union amended the Petition by including driver helpers, order processors, inventory control employees, cashiers and the warehouse merchandise return employee in the petitioned for unit of employees. The Union specifically seeks to exclude sales employees, managers, clerical workers and supervisors as defined by the Act. The Petitioner is not willing to proceed to an election in a unit that includes any other employees in addition to its amended unit. A unit limited to those identified by the Union's amended petition consists of approximately 43 employees.

The **Employer** contends that the **only** appropriate unit consists of the petitioned for employees, as amended, and including eight (8) sales employees. The unit advocated by the Employer consists of approximately 51 employees. The Employer asserted at the hearing that the sales employees share the requisite community of interest with the petitioned for unit of employees, as amended, since they interact to a significant degree with warehouse and operations employees and drivers and perform a function integral to the Employer's operations.

The record shows that president **Pricha Mekhaya**, assistant vice president of operations **Richard Ensley**, and marketing and import manager **Oscar Mekhaya** have the authority to determine the level of pay, assign work, reward or discipline employees, approve time off, or responsibly to direct them, or effectively recommend such action, all in the interests of the Employer and should be **excluded** from any unit found appropriate. The record further demonstrates that vice-president **Vipa Mekhaya** is the spouse of president Pricha Mekhaya and reports directly to him and should be **excluded** from any unit found appropriate. Assistant vice-president and comptroller **Pook Sirivicha** effectuates management policies, handles finances, human resources and employee benefits and holds herself out as a representative of management. She also has access to knowledge, data and records pertaining to labor relations of the Employer. Therefore, I find that Pook Sirivicha is a managerial employee and is **excluded** from any unit found appropriate.

The Employer requests in its brief, a finding with regard to the supervisory status of coordinator Sunt Mongkol, also known as Sonny, based on examination on the record by the Petitioner regarding Sonny's duties and authority. Sonny is a warehouse employee who coordinates activities in Warehouse Operations. The Petitioner took no position either at the hearing or in its brief, in support of or against a finding that Sonny is a supervisor. Neither the Petitioner nor the Employer assert that Sunt Mongkol exercises any indicia of supervisory authority and the record reflects a paucity of evidence upon which to make a determination. Bennett Industries, Inc., 313 NLRB 1363 (1994); The Ohio Masonic Home, 295 NLRB 390, 393 (1989); Golden Fan Inn, 281 NLRB 226, 229-230, fn. 12 (1986). Accordingly, he is **included** in the unit and is eligible to vote.

There is no history of collective bargaining for any of the Employer's employees.

## **THE EMPLOYER'S BUSINESS**

The Employer imports in excess of 1,000 different food products along with kitchenware and equipment from Asia and from manufacturers of Asian products within the United States, and distributes them from its facility in Columbia, Maryland to approximately 550 to 600 customers in 25 states in the eastern region of the United States. Its customers are comprised of supermarkets, grocery stores and mom and pop retail stores that service many different ethnic groups within the Asian American community, including Chinese, Japanese, Vietnamese, Cambodian, Laos, Thai and Buddhists. The majority of the Employer's customers receive deliveries on a weekly basis.

### **Physical layout**

The 30,000 square foot one story building is divided into nine quadrants that house different departments. Along the front of the facility are approximately nine delivery bays from which delivery trucks load and unload merchandise. Immediately within the front area of the facility and directly behind the bays are the receiving and consolidation departments. Merchandise unloaded from delivery trucks bringing imports by contract carrier directly from the Port of Baltimore are palletized and organized for storage in the receiving area. The consolidation area is used to organize merchandise for loading and delivery to the Employer's customers. Immediately to the right of the consolidation area is the enclosed Operations Center, which houses the warehouse office, the finance office and the breakroom. Along the wall of the Operations Center are windows through which the warehouse area activities can be observed. A window between the Operations Center and the warehouse office is open during all business hours, and employees communicate and pass paperwork through this open window. The warehouse office has desks shared by various classifications of employees for the purpose of completing paperwork and making telephone calls to customers. Although the warehouse office is enclosed by walls providing a quiet space for necessary communications between staff and with customers away from the noise of machinery and fork lifts in the warehouse areas, there are no enclosed offices within the warehouse office and employees work within that open space.

Located directly behind the receiving and consolidation departments is a large warehouse area used for storage of dry goods. Two separate areas to the left of dry goods storage and behind the Operations Center are designed to store frozen and refrigerated merchandise. The Employer also utilizes a 20,000 square foot annex facility as additional storage space for its dry goods located in Jessup, Maryland, but none of its employees are permanently assigned to work out of that facility. On a regular basis, a designated truck driver delivers dry goods to the annex and works with a checker to inventory the quantity and type of goods being stored there.

### **Organizational Structure and Operations**

The Operations Division is headed by assistant vice president of Operations Richard Ensley. It consists of several departments including a separate Sales Division, a Transportation Section, Warehouse Operations which consists of a receiving section, the consolidation section, the cold storage section, as well as a Processing Control Section which consists of inventory control, incoming order processing and incoming products control. The employee classifications at issue in this proceeding, that is the petitioned for unit as amended, as well as the contested sales employees, are all grouped within the above-described sections.

The Employer's flow of commerce begins with orders placed by marketing manager Oscar Mekhaya or president Pricha Mekhaya with its suppliers in Asia. The marketing manager relies on information solicited from the Employer's sales employees concerning how well particular types of merchandise is selling and is mindful of the important holidays celebrated in Asian communities, including the Chinese, Japanese, Vietnamese, Thai and Buddhist New Years, when placing orders. It takes from 4 to 6 weeks for the merchandise ordered to be delivered by steamship into the Port of Baltimore. The Inventory Control Section coordinates payment for the goods with the accounting department and makes necessary arrangements for clearance through U.S. Customs, the Food and Drug Administration and the United States Department of Agriculture. A contract carrier transports the merchandise in the same steamship container to the Employer's Columbia facility. Inventory control employees receive an advance packing list from the supplier by mail or courier service and confer with warehouse receiving employees to develop a schedule for unloading and palletizing the merchandise. Inventory control employees also conduct weekly, monthly, semi-annual and random checks of the inventory in the warehouse.

***Warehouse employees*** in the receiving section unload and palletize the merchandise. Drivers do not unload the merchandise. The container of merchandise comes from the Port of Baltimore unwrapped, and the company uses sheets of plastic wrap to wrap the merchandise which may be in boxes or crates. Most of the product is not removed from the boxes they come in. The three (3) ***inventory control employees*** and the one (1) ***merchandise return employee*** inspect the delivered merchandise to determine any problem with quantity or quality of the order. The general warehouse staff, including receiving and warehouse employees along with inventory control employees jointly decide the best location for storage of the merchandise taking into consideration the current demand for the product, warehouse space, the country of origin, as well as volume and weight of the product. Inventory control employees enter data into the computer

in order to reflect the correct amount of inventory after a new shipment has been received and processed.

At the same time, there are four (4) **order processors** who handle orders that are either called in by telephone by the Employer's salesmen or are being faxed in directly from the customer. The salesmen submit most orders and it is not customary to receive call-in orders from the customer. Certain customers visit the facility to place orders in person. The order processor works in the Operations Center and inputs the order into the computer system, which generates a picking ticket. The order processor hands the picking ticket to **warehouse employees** designated as pickers through the open window in the warehouse office or actually goes to the warehouse area to deliver the picking ticket. There are separate picking tickets generated for the refrigerated and frozen sections. The pickers are warehouse employees grouped in the consolidation section of the Warehouse Operations. The pickers ride on pallet jacks throughout the warehouse selecting the merchandise itemized on the picking ticket and bring the completed order into the consolidation area. After all orders have been completed, the picker signs off on the ticket and gives it to the **checkers** who check the order inside the consolidation area. Checkers also consolidate completed picking tickets for the same customer from dry goods, the refrigerated and frozen storage areas. The paperwork is consolidated by store and then by route. Checkers verify that the correct type and quantity of product was picked and then pass the signed ticket on to the order processors. Any discrepancies between what the customer originally ordered and the completed order are resolved through inspection by order processors and checkers. After all discrepancies have been resolved, the order processors issue an invoice in triplicate for each order and a route summary. These documents are given to the two (2) cashiers in the Operations Center.

The **cashier's** job is to generate a delivery summary and merchandise release report from one copy of the invoice, which is organized by store and by route, for use by the drivers. The cashiers later rely on their filed copy of the invoice to arrange for bill collection following the two-week automatic extension of credit to customers.

There are twelve (12) to thirteen (13) petitioned-for **drivers** grouped in the Transportation Section, who report directly to Ensley. Drivers deliver merchandise in company provided trucks to the Employer's customers on both local and long distance routes. Drivers report for duty at 8:00 a.m. first to Ensley and then to the Operations Center and are required to pick up the necessary paperwork from the cashiers, including invoices, a delivery summary, merchandise release report, daily logs and trip records. Normally the various routes have been decided on and assigned the afternoon before. The drivers go into the consolidation area of the warehouse and inspect the assembled merchandise comparing it against what is listed in the invoice. They are assisted by checkers in this part of their job. Once any potential discrepancies are worked out between the merchandise listed on the invoices and what is actually available for delivery, the driver signs off on the merchandise release form and assumes responsibility for the merchandise. The driver leaves on his assigned route and drives to the customer's facility to make delivery. Depending on the size and weight of the load, and distance of the trip, the driver may be assigned one of three (3) **driver's helpers**. The driver's helpers assist with unloading merchandise at the customer's facility. They also report directly to Ensley.

There are no pre-assigned established routes. Routes are decided on after consultation among drivers, order processors and inventory control employees and group stores together based on volume and weight of merchandise to be delivered and the number of pallets. The most senior drivers are able to get the newest equipment and can elect the route they like, as some drivers like assignments to Florida and to Boston. The drivers deliver and unload the merchandise to the customer's facility, and check the merchandise with the customer to insure that the delivered merchandise matches the customer's order. Upon verification, the customer is required to sign the invoice and retains a copy, with one copy of the invoice to be returned by the driver to the Employer. If there is any problem with the merchandise, the driver is required to obtain authorization either from the salesmen assigned to the customer or from order processors or the merchandise return employee to bring the product back to the Employer. Upon return to the facility, the driver must submit the appropriate paperwork to the cashier, including the signed invoice, the trip summary and driver log to enable bill collection from customers and proper payment to the driver, based on his mileage and hours worked.

There are eight (8) *sales employees* grouped separately in the Sales Division of the Employer, who all report directly to Ensley. The sales employees represent the Employer among its customers in the field on a day to day basis. They solicit orders from customers and maintain good customer relationships, and use an Asian, not English language in their communications. They spend 60-80% of their work time in the field with their assigned customers, and the remaining 20 to 40% at the Operations Center at the facility. Salesmen generally visit their customers weekly, to inventory the customer's needs, to assist the customer in anticipating its future product needs and to promote certain product. The number of customers assigned to a salesman is based on the volume of business the customer generates. The salesmen drive their own personal vehicles, which are not refrigerated. Salesmen occasionally deliver dry goods only to their assigned customer when the customer calls into the Employer to amend its previously submitted order, and it is too late to make the delivery truck. Such deliveries are an incident of their function as salesmen to maintain good customer relations. On average, one of the eight salesmen may deliver the fragile and expensive kitchenware directly to a particular customer in each week. Kitchenware sales account for approximately 10% of the Employer's volume of business.

Salesmen are sometimes on site when the truck arrives to deliver merchandise, especially at customers located in the Boston area, since it is a very large market area. There are weekly trips to the Boston area by any one of the drivers, and they are usually accompanied by a driver helper. The record failed to disclose the frequency of these contacts between salesman and driver, and there is no evidence that any of the drivers or salesmen coordinate their schedules. When both driver and salesman are at the customer's premises at the same time, salesmen may assist the drivers in unloading the truck that is delivering to their assigned customer.

Salesmen generally return to the facility once a week or once every two weeks, normally at the end of the week, depending on the salesman's own schedule. The salesmen's schedules are largely determined by the customers' business hours and they may often work on Sundays. While at the facility, the sales employees work from an island located in an open area of the Operations Center. They review their paperwork to insure collections and that their customers

have paid their bills. They work with other Operations Center and warehouse employees including cashiers, order processors and inventory control employees to resolve any problems that may arise in getting merchandise to their customers. They have access to the same two telephones, as do other Operations Center employees, to contact their customers. Sales employees provide their own mobile telephones to facilitate contact with the Employer and with their customers when on the road. Salesmen and truck drivers who happen to be present in the facility share information with each other concerning which roads are under construction, and alternate routes, as well as information about whether a particular customer may be closed due to a holiday. Newly hired salesmen train in the warehouse for the first two months of their employment, under working conditions and pay applicable to warehouse employees, in order to learn the facility operations on a first hand basis.

### **HOURS OF WORK**

All warehouse and operation center employees, excluding drivers and salesmen, work a 40-hour workweek from 8:00 a.m. to 4:30 p.m. There is no set hours of work for salesmen. They cannot choose which hours they work as it is based on customer demand and customer schedule. They usually work 12-15 hours per day, and on average 60 hours per week. Salesmen determine the day of the week they report into the facility, and are not required to remain the entire 8 ½ hour day. They may leave after their paperwork is done. Drivers report in at 8:00 a.m. to get their route assignments, but the delivery route determines their workday. A driver may decide to leave at 1:00 a.m. in order to deliver to a customer by 10:00 a.m., depending on the driving distance and other variables. Drivers return to the facility more often than salesmen since even a trip to Florida or Boston would take only two days to complete.

Drivers and warehouse employees punch a time clock. Salesmen do not punch a time clock since they track their volume of business, not their hours worked. Operation Center employees do not punch a time clock, but rather record hours by signing in and out.

### **EMPLOYEE COMPENSATION**

Warehouse employees earn hourly wages in the range of \$7.25 to \$10.25 per hour, and can earn overtime. All Operations Center employees, including inventory control employees, order processors, the warehouse merchandise return employee and cashiers are salaried employees. Their salaries equate to hourly pay rates between \$8.33 and \$15.78 per hour, and they are also eligible for overtime pay. Drivers earn either an hourly local rate or an hourly road rate. The local hourly rate for a trip within Maryland, or to Virginia or Pennsylvania with no overnight stay, is between \$11.50 and \$13.75 per hour, while the hourly road rate for trips requiring an overnight stay is \$15.50 to \$17.75 per hour. The average \$4 per hour higher road rate compensates the driver for travel expenses, including lodging and meals. They are not reimbursed for these expenses, as it is already included in the higher hourly rate. Drivers do not earn overtime pay.

Salesmen earn a salary plus a 2% commission of sales, after reaching a base target measured out over a four-week period. There is no maximum cap on the amount of commission

a salesman can earn after he has reached the base target. Depending on effort expended, level of success and volume of sales, salesmen may earn \$30,000 to \$60,000 annually which is equivalent to hourly pay rates of between \$10 and \$20 per hour. Sales employees submit receipts and are reimbursed for all lodging expenses, meals and gas.

### **EMPLOYEE CONTACT**

The record shows that warehouse and Operations Center employees have substantial daily contact throughout the Employer's facility, and especially in the warehouse office inside the Operations Center. They all work to receive, inventory, store and prepare merchandise for shipment out from the facility for the purpose of fulfilling customer orders. Drivers have contact with employees in the Operations Center, including cashiers and checkers, who assist drivers in getting their merchandise released for delivery.

Sales employees have telephone contact with order processors and with drivers. Salesmen may confer with a driver about problems with a delivery to their assigned customers or to advise the driver of changed road conditions or changed customer business hours. Sales employees also have contact with warehouse employees when they may assist on a voluntary basis for several hours on the day that they report into the facility during the busy season between November and April. The record shows that the Employer experiences increased volume in business between November and mid-April since all the major holidays, including the Chinese, Vietnamese, Thai, Cambodian, Laotian and Buddhist New Years, fall within that time. The record shows that only 4 of the 8 salesmen assisted in this manner. There is no record evidence to establish the frequency of voluntary assistance from the salesmen during this six-month period. There is no work rule which requires the salesman's assistance, and the salesman is not compensated for any time spent assisting in the warehouse. From April to June 1998, the Employer increased its business volume in order to stockpile goods in response to higher steamship rates caused by crop shortages due to the El Nino weather pattern. This was a one-time occurrence during which time 3 to 4 of the 8 salesmen and one inventory control employee assisted in the warehouse on a temporary basis.

### **INTERCHANGE AND TRANSFER**

There is minimal evidence of transfers between the employee groupings involved in this proceeding. The record shows that in the past three years, a Filipino warehouse employee transferred to sales upon the Employer's request as its business was growing among Philippine customers. The employee transferred back to the warehouse. In the past three years, an inventory control employee transferred to the warehouse. There is no other creditable evidence of employee transfer.

### **EMPLOYEE BENEFITS AND WORKING CONDITIONS**

There is no designated dress code, and although the Employer has uniforms, only some drivers and warehouse employees wear them. The warehouse employees and drivers wear shorts, as well as jeans and tee shirts. Operations Center employees dress casually in jeans or

khakis. Sales employees wear slacks, a button down shirt and sweater, or polo shirt in warm weather. Some salesmen wear ties. All employees may park in employee areas of the parking lot. Warehouse and Operations Center employees are assigned lockers in the facility, but drivers and salesmen are not. Sales meetings are held by either the president or marketing manager with small groups of salesmen to discuss issues of product quality, customer reception to products and marketing campaigns. Drivers do not attend these sales meetings. No such meetings are held with truck drivers even though they have contact with customers.

All factors involved in determination of employee benefits apply equally to all employee groups, including level of benefit, time period for eligibility and duration. The record shows that employee groups at issue in this proceeding are similarly treated with respect to medical health insurance and dental benefits, life insurance, the Employer's 401k and profit sharing plans, paid holidays, paid sick leave, vacation, employee food purchase discount, employee loan plan and holiday gifts. There is a singular difference that relates to scheduling and business needs. The record shows that the operations assistant vice-president approves vacation time requests for all warehouse and Operations Center employees, but that the Employer's president Pricha Mekhaya must approve vacation requests by salesmen in the busy period between November and mid-April.

## ANALYSIS AND CONCLUSION

**Section 9(b)** of the Act states that "the Board shall decide in each case whether, to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, or subdivision thereof."

The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." Morand Bros. Beverage Co., 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951); Parson Investment Co., 152 NLRB 192, n. 1 (1965); Federal Electric Corp., 157 NLRB 1130 (1966); Capital Bakers, 168 NLRB 904, 905 (1968); National Cash Register Co., 166 NLRB 173 (1967); and Dezcon, Inc., 295 NLRB 109 (1989). A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." P. Ballantine & Sons, 141 NLRB 1103 (1963); Bamberger's Paramus, 151 NLRB 748, 751 (1965); Purity Food Stores, 160 NLRB 651 (1966). There is typically more than one way to group employees for purposes of collective bargaining. General Instrument Corp. v. NLRB, 319 F.2d 420, 422-3 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); Mountain Telephone Co. v. NLRB, 310 F.2d 478, 480 (10th Cir. 1962). In determining whether a petitioned-for unit is appropriate, the Board notes that the unit sought by the petitioning union is always a relevant consideration. The Lundy Packing Company, Inc., 314 NLRB 1042, 1043 (1994), citing E.H. Koester Bakery & Co., 136 NLRB 1006 (1962). Moreover, the unit sought by a petitioner in a representation case need not be the most appropriate unit, but need only be an appropriate bargaining unit. Morand Brothers Beverage Co., supra at 418. The

Employer carries a heavy burden of showing both that the designated unit is clearly not appropriate and that its claimed unit of drivers, warehouse and operation center employees, and salesmen is appropriate. The Employer has failed to meet this standard.

I find that the petitioned-for unit, as amended at the hearing, consisting of drivers, driver helpers, warehouse employees, checkers, order processors, inventory control employees, cashiers and warehouse merchandise return employees, is *an* appropriate unit for purposes of collective bargaining. Moreover, and contrary to the Employer's position, I find the salesmen do not share a sufficient community of interest with the drivers, warehouse and Operations Center employees so as to *require* their inclusion in the appropriate unit.

The applicable legal standard is enunciated clearly in NLRB v. Great Western Produce, Inc., 839 F.2d 555 (9<sup>th</sup> Cir. 1988); 127 LRRM 2662; enf'g 282 NLRB No. 17 (1986). The Court of Appeals determined therein that the Board did not abuse its discretion in finding that the salesmen employees of a wholesale produce distribution company did not share a community of interests with the unit of drivers and warehousemen. The employer in Great Western was a wholesale distributor of food products as is the Employer herein. The Court upheld the Board's analysis that warehouse employees and drivers used skills and performed duties distinct from the skills used and duties performed by salesmen.

The record shows that the employees in the proposed bargaining unit share a strong community of interest. The Employer does not contest that warehouse and Operations Center employees, along with truck drivers and their helpers share a community of interest. Warehouse and operations employees work at the Employer's facility and are charged with the responsibility of keeping an accurate inventory of merchandise delivered to the Employer and sent out to its customers, for appropriate storage of the merchandise while at the facility and for unloading and loading the merchandise. The truck drivers and their helpers report to the facility for assignments and work with various operations employees in the warehouse and Operations Center, including checkers, inventory control employees, order processors and cashiers to insure the accuracy of the order for delivery to the customer. Thus, warehouse and operations employees and truck drivers all perform the interrelated function of warehousing, loading and delivering the Employer's merchandise. The record shows that these warehouse employees and drivers are paid hourly wages, and that operations employees are salaried.

Sales employees perform a function distinct in the Employer's business. The sales employees are relied upon to market the Employer and its products among a diverse community of retail establishments within the eastern region of the United States. Salesmen spend the vast majority of their time in the field with customers and potential customers. Salesmen cultivate the relationship between the Employer and its customers. The salesmen are required to have a command of the English language and know one Asian language, since communications with customers are conducted in an Asian language. No other employee group is required to have knowledge of an Asian language. Salesmen work with each customer on a weekly basis to assist the customer in anticipating its need for particular merchandise and assist the customer in promoting the merchandise. Deliveries by the salesmen are an incident to their role as

ambassadors of the Employer, as when a late request by a customer misses the Employer provided delivery truck. Salesmen drive their own personal vehicles not equipped with refrigeration equipment, and thus can only take dry goods with them. The salesmen's primary function is to sell and to interact with the customer. Their function is distinct from the warehousing, inventory and unloading/loading functions. Any contact with drivers or with warehousemen is but incidental and subsidiary to their principal duty in communicating with the Employer's customers.

Salesmen may report to the facility once a week, in order to complete their paperwork and to address customer concerns. Once their paperwork is complete, they are not required to put in an 8 ½ hour day. They are not required to assist in any function at the facility, although half of the salesmen have volunteered to load and unload in the warehouse during the busy period. There is no compensation for this additional work, and the record fails to show the frequency of the assistance rendered by each salesman.

Sales employees are the only group of employees who meet regularly with the president and/or marketing manager to discuss marketing strategies and the customer's reaction to certain products. Warehouse and operation center employees and drivers do not attend these meetings, even though drivers have some customer interaction. There is no designated dress code, warehouse employees and drivers dress casually based on the weather, i.e. tee shirts, jeans and/or shorts. Operation center employees wear tee shirts and jeans or khakis. Salesmen dress semi-casually, but they do not wear jeans, or shorts or tee shirts when working with customers in the field. The record shows that they wear slacks, polo shirts or button down shirts with a sweater and/or tie.

Sales employees are the only employees who earn commissions. After reaching a base target rate over a four-month period, the sales employee can earn 2% of sales, with no outside limit on the amount of commission he can earn. The record reflects that salesmen average annual earnings of \$30,000 to \$60,000, extrapolated to a wage rate of \$10 to \$20 per hour. Unlike truck drivers, salesmen are reimbursed separately for travel expenses. Thus, there is a wider range in the averaged hourly earnings of drivers and salesmen than meets the eye. The sales employees work irregular long hours driven by their customers' business hours. They average 60 hours per week, and often work Saturdays and Sundays. Warehouse and operations employees regularly work 40 hours per week from 8:00 a.m. until 4:30 p.m. Warehouse employees are eligible for overtime earnings. Drivers are required to report into the facility at 8:00 a.m. to receive their route assignment(s), but can also set their departure times taking into account distance, road conditions and arrival time.

There is minimal reliable evidence of interchange or transfer from sales employees to either the warehouse/operations area or to driving, or vice versa. Only one warehouse employee in the past three years transferred to salesman duties for a brief period and later transferred back to the warehouse. Sales employees have contact from off site and at the facility with operations employees in order to troubleshoot problems with customers' orders. Salesmen also exchange information with drivers when they are both at the facility concerning conditions on the road or changes in the customer's hours of operation. Salesmen and drivers may see each other at the customer's premises, especially in the larger Boston market. These occurrences are happenstance and not prearranged. Drivers on the Boston route are normally accompanied by driver helpers who

assist with unloading merchandise. The salesman may assist in unloading merchandise for his customer.

The cases relied on by the Employer finding appropriate the inclusion of salesmen into a unit of warehouse employees and drivers are unpersuasive. They rely on the close physical and functional integration of sales employees working inside the facility within the retail industry. See Gustave Fisher, 256 NLRB 1069 (1981); Montgomery Ward & Co., 259 NLRB 280 (1981). In Wards, the salesmen worked inside the retail establishment and interacted with customers inside the store. The inside salesmen worked on a daily basis in close proximity to the warehouse clerical employees in the same distribution center. The facts herein are clearly distinguishable. The Employer herein is engaged in the wholesale distribution of produce, and its operations are organized differently than the retail operations in Wards. The salesmen spend the vast majority of their time away from the facility and away from other warehouse and operations employees. The salesmen herein have daily contact with the Employer's customers located in over 25 states in the eastern region of the United States. Common shared benefits by all employee groups herein are not determinative of the appropriateness of a unit and are insignificant in view of differences in skill and function.

A unit of truck drivers and warehousemen has traditionally been found to be appropriate. See Institutional Food Services, 258 NLRB 650, 651 (1981). I find that the salesmen have unique working conditions that are wholly different from those of the amended petitioned for unit of employees. Their contact with the unit employees is incidental to their primary function as salesmen. The salesmen's job requires materially different skills, duties and responsibilities compared to the unit employees. I find that the **salesmen** do not have a community of interest requiring their inclusion in the bargaining unit. Accordingly, I shall **exclude** the salesmen from the unit and they are **ineligible** to vote.